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Supreme Court of the United States

..... TERM, 1965.

No. 279

CHARLES H. BLANCHARD d/b/a BLANCHARD CONSTRUCTION COMPANY,
Petitioner,

versus

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

GEORGE E. MORSE,
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IN THE SUPREME COURT OF THE UNITED STATES

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ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals, Fifth Circuit, affirming the action of the lower court denying petitioner relief under Federal Rule of Civil Procedure 60(b).

Opinions Below.

There was no formal opinion of the District Court. The opinion of the Court of Appeals for the Fifth Circuit (App. A, *infra* pp. 9-26) is reported at 341 F2d 351.

JURISDICTION.

Order of the District Court was entered on October 14th, 1963. Timely appeal was perfected to the United States Court of Appeals for the Fifth Circuit, which affirmed the District Court on February 9th, 1965. (Appendix F, p. 32.) A timely petition for rehearing was filed by petitioner and it was overruled on March 12th, 1965 (Appendix B, p. 27). The jurisdiction of this Court is invoked under 28 U. S. Code Sec. 1254 (1). The federal question was raised in the District Court by petitioner's motion for relief under Rule 60B(4) (5) and (6).

STATUTES INVOLVED.

The following statutory provisions are set forth in the Appendix E, p. 31: Title 41 U. S. Code, Sections 321 and 322. The following federal rule of civil procedure is set forth in Appendix D, p. 29; Rule 60 (b).

STATEMENT.

When petitioner's contract with the government was terminated for default in performance (R. 109-110) he was a solvent contractor and had twenty-two days remaining to complete the contract (R. p. 76). Under the disputes clause of his contract he appealed to the Armed Services Board of Contract Appeals (ASBCA), which on August 29, 1962 sustained each of his appeals and found that the ". . . . . termination of appellant's right to proceed was improper" (R. p. 97).

On September 28, 1962, the government through its representative notified petitioner that the government's notice of default termination ". . . . . dated 18 July 1962 is deemed to have been issued pursuant to clause 23 entitled 'Termination for Convenience of the Government,' effective 25 July 1961, the date you received said notice of default termination." (R. p. 113, 114.)

On August 22, 1962, judgment was entered in District Court in the amount of $79,840.84 for respondent against petitioner, representing costs allegedly incurred by respondent as the result of completing the contract between petitioner and the government. (The bond is found p. 15 of the record.)

Respondent undertook to complete petitioner's contract by a supplemental agreement dated July 27, 1961. (R. p. 120.) Under the terms of that agreement respondent was to perform or to procure the performance ". . . . of all work called for under said contract not presently completed", *supra*.

The judgment from which relief is sought was based on claim by respondent against petitioner, demanding indemnity ". . . for loss sustained because of plaintiff's (petitioner's) default". (R. p. 8.)

QUESTIONS PRESENTED.

Petitioner, under contract with the United States to renovate buildings was placed in default of his contract even though he was solvent and had been granted time

to complete the work. His bonding company completed the job, and under its contract of indemnity with petitioner obtained a judgment against petitioner based upon his alleged default. Prior to entry of that judgment petitioner appealed the termination of his contract and other disputes to the Armed Services Board of Contract of Appeals, (ASBCA) and was sustained in all of his appeals. The government converted the termination of his contract for default in performance *nunc pro nunc* to convenience of the government. He was sustained by the ASBCA seven days after judgment was entered against him for his bonding company. The conversion of the default took place thirty-seven (37) days after entry of judgment. Timely motion under FRCP 60(b) was filed asking relief from the judgment, from which facts the following questions are presented:

(1) Whether the cause of action of the bonding company under its indemnity contract with petitioner was subject to the right of petitioner to appeal his wrongful termination to the ASBCA?

(2) Whether the bonding company was a volunteer of its services to the government, when it knew that the termination of petitioner's contract was not a final judgment, but was subject to appeal?

(3) Whether the discretion allowed Federal Courts under FRCP 60(b) to relieve a defendant of the effects of a judgment is sufficiently broad to permit the court to vacate a judgment based upon facts which have changed within seven days after entry of the judgment?

(4) Whether the refusal of the trial court to answer (3) above in the affirmative is an abuse of discretion?

(5) Whether the decision of the ASBCA sustaining petitioner's appeal from the decision of the contracting officer placing him in default is a *quasi* judicial decision binding upon the United States on one hand and the petitioner and his bondsman on the other?

Reasons for Granting the Writ.

When petitioner's contract with the government was terminated, his sole remedy was an appeal to the Armed Services Board of Contract Appeals (ASBCA).[1] Having written the performance bond for petitioner, the respondent's liabilities were measured by the same contract which gave the petitioner the right of appeal. When petitioner's contract was terminated, respondent had two choices: (a) It could refuse to complete the contract, awaiting the outcome of petitioner's appeals, or (b) complete the contract, at the risk of petitioner prevailing in the ASBCA. It chose the latter, and notwithstanding the fact that petitioner is not in default, respondent desires to collect on a judgment which was premised on the termination of the contract for default in performance.

Respondent, the lower court and the Fifth Circuit fail to see more in the ASBCA decision than an adjustment of a dispute between the petitioner and the government. And herein we believe lie the seeds of a grave injustice, as well as a misconception of the law. For the Wunderlich Acts as interpreted by this court provide remedies for *quasi* judicial determination of disputes between the government and its contractors. Respondent has all along

[1] 41 USC Sects. 321 & 322; *U.S. vs. Bianchi & Co.*, 373 U. S. 709; *U. S. vs. Holpuch*, 328 U. S. 234.

contended that its hands were tied when the contracting officer terminated petitioner, and called upon the bonding company to complete the contract. In so doing it accords to the decision of the contracting officer a sense of finality which a reading of the Wunderlich Acts and the cases deciding it would be promptly correct. It treats the decision of the contracting officer as final, and the decision of the ASBCA reversing the contracting officer as having no meaning. But the orderly administration of disputes between the government and contractors demands a respect of the right of the contract to appeal his disputes. The right of petitioner to appeal was of the same moment as if a resolution of the dispute had been a decision adverse to the contractor in a court of law. Until the time for appeal expired, the decision would not have been final, and once an appeal had been taken the actions of the bonding company would have to be measured against the possibility that its principal might prevail in its appeals. Bonding companies are in business to take such risks.

The decisions of the lower court and the court of appeals refusing relief to petitioner do not accord to Rule 60(b) FRCP the liberal interpretation to which lip service has been given by the Fifth Circuit and other courts, and once it is conceded that the disputes clause of the contract read with the Wunderlich Acts provide a *quasi* judicial procedure for the determination of disputes, it is impossible to agree with Judge Morgan[2] that the facts in the case of *Michigan Surety Company v. Service Machinery Corp.*, (5 Cir. 1960) 277 F2d are "inopposite".

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[2] Sitting by designation with Judges Rives and Wisdom in *Blanchard v. St. Paul Fire and Marine Insurance Company*, (5th Cir., 1965), 341 Fed 2d 351.

Judge Morgan and the court concluded that "The favorable administrative decision which Blanchard later obtained against the United States for the wrongful termination of his contract should not entitle Blanchard to relief under Rule 60(b)." Petitioner urges the court that it is precisely because of the favorable administrative ruling that he should be given relief. He was confined by law to the administrative procedure of appeal. Had he prevailed before respondent obtained a judgment against him, there is little doubt that the favorable administrative decision would have been a bar to the respondent's action for indemnity.

Neither the District Court nor the Fifth Circuit has come to grips with the real; meaningful question, which stated rhetorically is: How can a judgment premised on the default of petitioner in the performance of his contract be permitted to stand, when it is later determined that he was not in default?

CONCLUSION.

It is respectfully submitted that the writ should be granted in order to permit this court to clarify the legal effect of the final order of the ASBCA overruling the contracting officer, to give meaning to the equitable relief implicit in Rule 60(b) and to do justice to petitioner.

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APPENDIX "A".

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21,107

CHARLES H. BLANCHARD, d/b/a BLANCHARD CONSTRUCTION CO.,
Appellant,

versus

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Appellee.

No. 21,111

CHARLES H. BLANCHARD, d/b/a BLANCHARD CONSTRUCTION CO.,
Appellant,

versus

UNITED STATES OF AMERICA, ET AL.,
Appellees.

Appeals from the United States District Court for the Northern District of Florida.

(February 9, 1965.)

Before RIVES and WISDOM, Circuit Judges, and MORGAN, District Judge.

MORGAN, District Judge: These appeals from the District Court were consolidated for the purpose of brief-

ing and argument, and both cases having originated from the same transaction, in the interest of clarity and expediency, this Court will consider both appeals in this Opinion.[1]

Both cases grow out of a contract entered into on August 25, 1960, between Charles H. Blanchard, d/b/a Blanchard Construction Company (hereinafter referred to as "Blanchard") and the United States of America for the repair and modernization of airmen dormitories at Keesler Air Force Base, Biloxi, Mississippi. St. Paul Fire and Marine Insurance Company (hereinafter called "St. Paul") was the surety on Blanchard's performance bond. The contract was to be completed in 240 days, or by May 5, 1961. However, the completion date was extended by the United States until August 20, 1961. On July 18, 1961, the United States Contracting Officer terminated the contract for default in performance. Blanchard appealed to the Armed Services Board of Contract Appeals (hereinafter referred to as ASBCA).

Immediately upon the termination, the United States called upon St. Paul, as surety for Blanchard, to complete the contract. In order to mitigate the damages, St. Paul

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[1] No. 21,107, *Charles H. Blanchard, d/b/a Blanchard Construction Co. v. St. Paul Fire and Marine Ins. Co.*, is an appeal from a decision denying the appellant relief under 60(b)(4), (5) and (6) of the Federal Rules of Civil Procedure.
No. 21,111, *Charles H. Blanchard, d/b/a Blanchard Construction Co. v. United States of America and St. Paul Fire and Marine Ins. Co.*, is an appeal from a decision dismissing the appellant's claim against appellee United States on the ground that the District Court lacked jurisdiction under the Federal Tort Claims Act, Title 28, U.S.C., 1346(b), 2671, et seq., and dismissing the appellant's claim against appellee St. Paul on the grounds of res judicata.

took over the contract for completion. In addition to the demand for takeover, St. Paul had the right to assume the contract under its Indemnity Agreement with Blanchard which contained a provision:

> "The company shall have the right at its option and in its sole discretion—
>
> (a) To take possession of all or any part of the work of the said contract whenever, in its sole opinion, such action is desirable or necessary, and at the expense of the undersigned to complete or to contract for the completion of the same, or to consent to the reletting or completion thereof by the owner or obligee in said bond."

St. Paul's right under this contract provision is not questioned.

At the time St. Paul took over the project, Blanchard furnished St. Paul with a list of unpaid labor and material charges in the amount of $277,482.31 which St. Paul paid. St. Paul then completed the contract and did no work other than the work required by the contract between Blanchard and the United States.

On January 3, 1962, Blanchard filed suit against St. Paul in the District Court of the Northern District of Florida for an accounting. Blanchard alleged that there was $400,000.00 due on his contract with the United States and that St. Paul should have been able to complete the contract for $250,000.00, and he demanded in the action that St. Paul be required to account to him

for the difference. St. Paul filed its answer denying the allegations of negligence and affirmatively pleaded that an accounting had been furnished Blanchard, and that the accounting showed Blanchard was indebted to St. Paul in the amount of $84,871.17, and St. Paul filed a counterclaim for this amount due on the basis of the Indemnity Contract between the parties.

Blanchard failed to file an answer to the counterclaim and, at the pre-trial hearing on April 17, 1962, was granted additional time by the District Court in which to make a responsive pleading. Blanchard then filed a motion to dismiss, motion for more definite statement, a motion to strike the counterclaim, and a motion for change of venue on the grounds that the action involved an action on a bond under the Miller Act, a reply to the counterclaim, and a motion for production of documents. Upon consideration of these motions, the Trial Court denied the motion to dismiss, the motion for change of venue, the motion for more definite statement, the motion to strike, and granted the motion for production of documents.

The trial of the case had been set at pre-trial on April 17, 1962, for May 22, 1962, and the Trial Court on May 1, 1962, confirmed the trial date. On May 7, 1962, Blanchard filed a motion for continuance on the grounds that the hearing in an action brought by him against the United States growing out of its contract termination was set for May 14, 1962, before ASBCA, and that due to the length of such trials, he would not be able to be present at the scheduled trial. The Trial Court con-

tinued the case, and trial was reset for August 20, 1962. Blanchard filed on August 16, 1962, another motion for continuance alleging that he was presently in litigation with the United States, that there were necessary documents to this litigation on file with ASBCA which were not available, and that he had pending certain other litigation in the Florida State Circuit Court on the date of August 20, 1962. The District Court denied Blanchard's motion for continuance and held that Blanchard's allegations in his motion were without merit, that the action was based on Blanchard's suit for accounting and St. Paul's countersuit on an Indemnity Contract and the case was set for trial. On August 20, 1962, the case went to trial on Blanchard's complaint for accounting and St. Paul's counterclaim on the contract for indemnity. Blanchard did not attend the trial. The Court, after hearing evidence, made its Findings of Fact and Conclusions of Law, and entered judgment for St. Paul on its counterclaim for the sum of $71,840.80 and $8,000.00 as attorneys' fees in accordance with the contract of indemnity. Blanchard filed a motion for a new trial on August 31, 1962, which was denied on September 13, 1962.

On September 14, 1962, the Court entered an order acknowledging the filing of Blanchard's "Amendment for a New Trial" ordering that said amendment be considered as a separate and distinct motion for a new trial. This "Amendment for a New Trial" filed by Blanchard was based on the grounds that ASBCA had ruled in his favor against the United States in his administrative proceedings. Blanchard's motion to withdraw his motion for a new trial was accepted by the

Court, and the Court stayed execution of judgment until August 25, 1962, so that the Court could notify the United States Attorney in the event the United States had any interest in the case, and provided further that Blanchard refrain from transferring or encumbering any assets until satisfaction of the judgment or his posting of a bond. A bond was posted and then Blanchard filed a motion for relief from judgment under Rule 60(b)(4), (5) and (6) of the Federal Rules of Civil Procedure.

In his motion under Rule 60(b), Blanchard alleged that the judgment was void; that a prior decision being a quasi judgment of a quasi judicial body upon which the judgment entered in the cause has been reversed and/or it is no longer equitable that the judgment entered therein should have prospective application; and that the judgment was entered without the presence of a necessary and indispensable party, to-wit: the United States.

After hearing argument of counsel on Blanchard's motion for relief under the provisions of Rule 60(b), Federal Rules of Civil Procedure, the motion was denied on October 24, 1962, but the Court left in effect the stay of execution and bond in order that Blanchard could proceed with his litigation against the United States in the administrative proceeding.

On December 21, 1962, subsequent to the denial of his motion for relief under Rule 60(b)(4), (5) and (6), Federal Rules of Civil Procedure, Blanchard filed a new action against the United States and St. Paul in the District Court for the Northern District of Florida upon the Federal Tort Claims Act (28 U.S.C., 1346(b), 2671, et seq.). In general,

against the United States, Blanchard charged the United States and its servants with negligence, and claimed that, because of the tortious acts of the United States, St. Paul, as surety for Blanchard, was called upn to complete the contract and, as a result, St. Paul had a claim against Blanchard for a portion of the damages sought by Blanchard against the United States. A separate cause of action was filed against St. Paul for negligence in performing Blanchard's contract and interfering with the performance thereof. The complaint sought $210,140.84 as judgment against the United States and also demanded a like amount against St. Paul.

St. Paul filed a motion to dismiss the complaint against it on the grounds that the Court had previously entered a judgment for St. Paul based on the same facts. St. Paul also filed a counterclaim against Blanchard under the Indemnity Agreement for damages arising out of payments it had made in behalf of Blanchard since entry of the original judgment. No answer has been filed by Blanchard to the counterclaim.

The United States moved to dismiss Blanchard's complaint upon the ground that the District Court lacked jurisdiction over the subject matter, and that the complaint failed to state a claim upon which relief could be granted.[2] Thereafter, the Court entered an order granting

[2] The United States urged that (1) the claim sounded in contract and, therefore, did not fall within the purview of the Federal Tort Claims Act, and (2) the District Court lacked jurisdiction under the Tucker Act (28 U.S.C., 1346(a)(2)) since the claim exceeded $10,000.00 and, in addition, that the complaint joined the United States with another party defendant.

the motion to dismiss of both the United States and St. Paul.

Blanchard then filed appeals on both cases. The questions presented are whether: (1) the District Court erred in Case No. 21,107 by refusing Blanchard relief from the judgment of St. Paul under Federal Rules of Civil Procedure, 60(b)(4), (5) and (6); (2) the District Court erred in Case No. 21,111 in sustaining the United States' motion to dismiss Blanchard's claim filed under the Federal Tort Claims Act; and (3) the District Court erred in Case No. 21,111 by sustaining the motion to dismiss the claim of Blanchard on the grounds that the claim was res judicata.

We first consider the question of the denial to Blanchard of relief under Rule 60(b)(4), (5) and (6). The portion of the rule upon which Blanchard relies is as follows:

> "On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons. . . . (4) the judgment is void, (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. . . .".
>
> Rule 60(b)(4), (5) and (6), *Federal Rules of Civil Procedure.*

In the case at hand, Blanchard contracted with the United States and with St. Paul, as surety. Under the Indemnity Agreement between Blanchard and St. Paul, St. Paul had the right to take over all or any part of the work whenever in its opinion such action is desirable or necessary. When the United States terminated Blanchard's contract (with or without good cause), St. Paul had no alternative but to perform or be subject to the payment of actual damages. St. Paul had no recourse against the United States. St. Paul's only recourse was against Blanchard which it asserted by way of counterclaim when, on January 3, 1962, Blanchard filed a suit for accounting in an amount approximating $150,000.00. The case was pending at issue on February 12, 1962, after St. Paul filed its answer and counterclaim. Pre-trial was had and the issues fully explored with all counsel on April 17, 1962. A continuance was granted from May 22, 1962, until August 20, 1962, to enable Blanchard to attend a hearing of his claim before ASBCA. Blanchard at that time was pursuing independent actions against both St. Paul and the United States. Blanchard's application for continuance on various grounds was denied on August 16, 1962, and the case proceeded to trial on August 20, 1962, resulting in judgment for St. Paul on its counterclaim.

This Court is cognizant that Rule 60(b) is to be liberally construed to carry out the purpose of avoiding the enforcement of an erroneous judgment, but we can find no error in the denial of relief under this rule in the instant case. The action of Blanchard against St. Paul for negligence and an accounting thereon, together with St. Paul's counterclaim against Blanchard for payments to

suppliers and materialmen, and labor charges exceeding funds received from the United States by an amount approximating $85,000.00, was a separate, independent, and distinct action from the claim of Blanchard before ASBCA for the wrongful termination of his contract with the United States. The issues as to whether suppliers, laborers, and subcontractors were payable in the action for accounting brought by Blanchard and in the counterclaim action by St. Paul were not and could not be determined by ASBCA. St. Paul was not and could not be a party to that proceeding. St. Paul's judgment was based on the contract of indemnity between Blanchard and St. Paul and not on any quasi judicial determination made by contracting authorities for the United States.

Blanchard alone had the remedy against the United States for wrongful termination in the administrative proceeding, and it is conceivable that St. Paul, not being a party to that proceeding, could be greatly prejudiced should Blanchard eventually recover from the United States and should St. Paul have its final judgment vacated under Rule 60(b), Federal Rules of Civil Procedure.

Under Rule 60(b)(5), *supra*, the District Court is empowered to relieve a party from final judgment when "it is no longer equitable that the judgment should have prospective application", or "(6) any other reason justifying relief from the operation of the judgment". Under this rule, Blanchard was not entitled to such relief as a matter of right and certainly not where no equitable grounds for relief were established by him. *Elgin National Watch Company v. Barrett,* (5 Cir., 1954) 213 F. 2d 776.

Counsel for Blanchard rely upon the case of *Michigan Surety Company v. Service Machinery Corp.*, (5 Cir., 1960) 277 F. 2d 531. This case is distinguishable from the case at hand. In *Michigan Surety,* the Florida Circuit Court dissolved an attachment and recovery was had on the attachment bond. Thereafter, the Florida Circuit Court was reversed by the Florida District Court of Appeals. This Court held that relief should have been granted by the District Court to the surety under Rule 60(b), as the judgment, if permitted to stand, would permit a recovery on a claim which had been extinguished. The facts in this case are inapposite. Blanchard, in this case, filed an action for negligence and accounting against St. Paul, and St. Paul filed a counterclaim under the indemnity bond. The issues between them were resolved by judgment. The favorable administrative decision which Blanchard later obtained against the United States for the wrongful termination of his contract should not entitle Blanchard to relief under Rule 60(b), *supra.* Blanchard's relief, if any, should be against the United States under the Tucker Act (28 U.S.C. 1346(a)(2), 1491). The District Court did not err in refusing Blanchard relief under Rule 60(b)(4), (5) and (6), Federal Rules of Civil Procedure.

The second question (Case No. 21,111) which concerns the Court is whether the District Court erred in dismissing Blanchard's claim against the United States filed under the Federal Tort Claims Act. Is Blanchard's claim against the United States a claim that is essentially one sounding in contract and thus not cognizable in the District Court under the Tort Claims Act?

The Federal Tort Claims Act, 62 Stat. 933, 982, as amended, 28 U.S.C. 1346(b), 2671, et seq., provides in pertinent part:

28 U.S.C., § 1346(b):

"Subject to the provisions of Chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

The Tucker Act, 25 Stat. 505, as amended, 28 U.S.C. 1346(a)(2), 1491, provides in pertinent part:

28 U.S.C., § 1346(a)(2):

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * * * * *

"(2) Any other civil action or claim against the United States, not exceeding $10,000 in

amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

28 U.S.C., § 1491:

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

* * * * * * *

The gravamen of Blanchard's complaint is that "the United States Government through its agents, servants and employees wrongfully interfered with the performance of . . . [his] contract" with the United States by "hampering" him in six different respects from completing the work undertaken. Blanchard alleged that as a result of this "legal interference with contract" he incurred extra costs and damages in the amount of $210,140.84.

As the language in the complaint makes clear, this claim is grounded essentially in contract and plainly does not come within the coverage of the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671, et seq. *Woodbury v. United States*, 313 F. 2d 291 (C.A. 9); see also *Smith v. United States*, 324 F. 2d 622 (C.A. 5). The District Court was

therefore clearly correct in ordering that Blanchard's claim against the United States be dismissed.

The Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671, et seq., was designed, with certain exceptions, to "remove the immunity of the United States from suits in tort. . . ." *Richards v. United States*, 369 U.S. 1. Uppermost in the mind of Congress when it waived this immunity were the ordinary common law torts. Of these, the example which is reiterated in the legislative history for submitting the United States to tort liability "is negligence in the operation of vehicles". *Dalehite v. United States*, 346 U.S. 15, 28.[3]

That claims based upon breach of contract are wholly alien to the Tort Claims Act is beyond question. *Woodbury v. United States*, 192 F.Supp. 924 (D. Ore.), affirmed, 313 F. 2d 291 (C.A. 9). As early as 1887, Congress surrendered the Government's sovereign immunity on claims based upon contracts which are expressed or implied in fact, by enacting the Tucker Act, 24 Stat. 505, as amended, 28 U.S.C. 1491. Today, the Tucker Act constitutes the sole basis for a suit against the United States sounding in contract and exclusive jurisdiction is in the Court of Claims if, as here, the amount in issue exceeds $10,000.00. As the Court of Appeals for the Third Circuit recently

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[3] The "tortious" acts allegedly committed by the Government and its agents in the instant case consist of: (1) insisting that 30 lb. felt be installed in the latrines; (2) demanding that additional deteriorated wood be removed from the building site; (3) urging that lumber treated with a certain compound be used; (4) requiring that metal lockers be installed in a specific way; (5) failing to specify within a reasonable time the electrical charges to be made; (6) terminating the agreement for default. While these allegations may state a cause of action for a breach of contract, it is axiomatic that the breach of one's own contract is not a tort. *Prosser, Torts*, § 106, p. 728 (2d Ed. 1955).

stated (*Drake v. Treadwell Construction Co.*, 299 F. 2d 789, 791, vacated on other grounds, 372 U.S. 772):

> "The generalized consent of the United States to be sued in contract appears in the Tucker Act, 28 U.S.C., §1491. But the Tucker Act divides jurisdiction over claims against the United States, whether founded on express or implied contract, between the Court of Claims and the district courts. Only claims for less than $10,000 are cognizable in the district courts. . . ."

It is settled that claims such as that asserted by Blanchard here—which are founded upon an alleged failure to perform explicit or implicit contractual obligations—are not deemed "tort" claims for the purposes of the division between Tort Claims Act and Tucker Act jurisdiction. This is so irrespective of whether the plaintiff chooses to characterize the failure in terms of "negligence" upon the part of the contracting officer or other government officials.

Woodbury v. United States, 313 F. 2d 291 (C.A. 9), is directly in point. In *Woodbury*, the plaintiff had organized a corporation to sponsor a project of constructing prefabricated housing at a Naval Base. The Federal Housing Administration and the Federal National Mortgage Association had, respectively, issued commitments to insure and to purchase the mortgages on the houses to be constructed. The Housing and Home Finance Agency made a loan to the plaintiff's corporation while construction was under way. Harassed by financial difficulties, Plaintiff's corporation, contractors, subcontractors and the Housing and Home Finance Agency entered into a "com-

pletion agreement" providing for completion of the project and payment of claimants, creditors and completion costs in a prescribed order. Timely completion of the project was not made and the commitments of both F.H.A. and F.N.M.A. expired. The plaintiff brought suit under the Federal Tort Claims Act in the District of Oregon for $853,676.82 for breach of an implied fiduciary obligation of the Housing and Home Finance Agency to arrange for or provide long-term financing.

The District Court dismissed the action for lack of jurisdiction and the Ninth Circuit affirmed. While not disputing the plaintiff's contention that breach of fiduciary duty is a tort, even though the duty is created by contract, the Court concluded that the claim did not come within the ambit of the Tort Act (313 F. 2d 294-295).

At the outset of its discussion, the Ninth Circuit pointed to the fact that the law to be applied under the Tort Claims Act differs from that which governs Tucker Act suits (Id. at 295):

> "It has long been established that the law to be applied in construing or applying provisions of government contracts is federal, not state law. [Citing cases.] It is clear to us that, on principle, federal law must govern the interpretation and application of a contract which is the basis for jurisdiction in an action under the Tucker Act, and it has been so held. (Girard Trust Co. v. United States, 3 Cir., 1945, 149 F. 2d 872, 874). The Federal Tort Claims Act expressly provides for liability of the United States for torts 'under circumstances where the United States, if a pri-

> vate person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred'. (28 U.S.C., § 1346(b)). Under this Act, therefore, state law, not federal law, controls."

Thus (ibid.):

> "[T]o permit the result here sought would give to the plaintiff not only a choice of forum (district court rather than Court of Claims where over $10,000 is sought), but also a choice of law."

Also relevant is this Court's own recent decision in *United States v. Smith*, 324 F. 2d 622, in which the Court reversed a Tort Claims Act judgment based upon the allegedly negligent failure of a government contracting officer to require a prime contractor to post a payment bond pursuant to the Miller Act, 40 U.S.C. 270a. In the course of its opinion, this Court quoted with approval (324 F. 2d at 625) *Woodbury*.

The rationale of *Woodbury*, thus approved by this Court in *Smith*, applies with particular force to this case. As the complaint plainly reflects, the sole relationship between Blanchard and the United States was wholly contractual in character. It is equally clear from the face of the complaint that Blanchard's asserted grievance relates exclusively to the manner in which various government officials—in particular the contracting officer and the termination officer—performed their responsibilities with respect to the execution of the contract. Blanchard does not, as he cannot, dispute that, in the words of the Ninth Circuit adopted by this Court, "the claim is in sub-

stance a breach of contract claim." As a consequence, it clearly falls outside the reach of the Tort Act.

The final question to be decided is whether the District Court erred in Case No. 21,111 by sustaining the motion of St. Paul in dismissing the claim of Blanchard on the grounds that the action was res judicata.

The doctrine of "res judicata" is that a cause of action finally determined between the parties on the merits by a Court of competent jurisdiction cannot again be litigated by new proceedings before the same or any other tribunal, the judgment or decree so rendered being a complete bar to any subsequent action on the same claim or cause of action between the same parties or those in privity with them, and extending not only to questions actually decided, but to all grounds of recovery or defense which might have been presented. *Heiser v. Woodruff,* 327 U.S. 726, 66 S. Ct. 853, 90 L.Ed. 970; *Kelliher v. Stone & Webster,* (5 Cir., 1935) 75 F. 2d 331; *United States v. Burch,* (5 Cir., 1961) 294 F. 2d 1. The action of Blanchard against St. Paul in his first complaint alleging wrongful overpayment to suppliers of labor and materials, and St. Paul's illegal retention of an amount approximating $150,000.00 under the surety contract between the parties, together with the defense and counterclaim of St. Paul and the judgment of the District Court on the issues foreclosed a later action by Blanchard against St. Paul for alleged acts of negligence growing out of the same contract of suretyship between the same parties.

The judgments in both cases, No. 21,107 and No. 21,111, are AFFIRMED.

APPENDIX "B".

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21,107

CHARLES H. BLANCHARD, d/b/a BLANCHARD CONSTRUCTION CO.,
Appellant,

versus

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Appellee.

No. 21,111

CHARLES H. BLANCHARD, d/b/a BLANCHARD CONSTRUCTION CO.,
Appellant,

versus

UNITED STATES OF AMERICA, ET AL.,
Appellees.

Appeals from the United States District Court for the Northern District of Florida.

ON PETITION FOR REHEARING.

(March 12, 1965.)

Before RIVES and WISDOM, Circuit Judges, and MORGAN, District Judge.

PER CURIAM: It is ORDERED that the petition for rehearing in the above entitled and numbered causes be, and the same is, hereby DENIED.

APPENDIX "C".

MOTION FOR RELIEF FROM JUDGMENT UNDER RULE 60B (4, 5, AND 6).

Filed Oct. 10, 1962.

(Title Omitted.)

Now comes the plaintiff, Cross defendant, in the above styled cause and moves the Court to relieve him from the final judgment entered in this cause, assigning as follows:

1. The judgment is void.

2. A prior decision being a quasi judgment of a quasi judicial body upon which the judgment entered herein is based has been reversed and/or it is no longer equitable that the judgment entered herein should have prospective application.

3. The judgment entered herein was entered without the presence of a necessary and indispensable party, to-wit, The United States Government.

All of the foregoing grounds are supported by the instruments of writing annexed hereto as Exhibits "A" and "B".

Respectfully submitted,
MORSE AND MORSE,
By GEORGE E. MORSE,
Attorneys for Plaintiff.

Hatten Bldg.,
Gulfport, Miss.

APPENDIX "D".

Federal Rule of Civil Procedure 60(b)

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of

review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946, effective March 19, 1948; Dec. 29, 1948, effective Oct. 20, 1949.

APPENDIX "E".

Title 41 United States Code.

§ 321. Limitation on pleading contract-provisions relating to finality; standards of review

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fradulent[1] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence. May 11, 1954, c. 199, § 1, 68 Stat. 81.

§ 322. Contract-provisions making decisions final on questions of law

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board. May 11, 1954, c. 199, § 2, 68 Stat. 81.

[1] So in original. Probably should read "fraudulent".

APPENDIX "F".

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1964.

No. 21,107.

D. C. Docket No. 1191-Civil.

CHARLES H. BLANCHARD, d/b/a BLANCHARD CONSTRUCTION CO.,

Appellant,

versus

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Appellee.

Appeal from the United States District Court for the Northern District of Florida.

before RIVES and WISDOM, Circuit Judges, and MORGAN, District Judge.

JUDGMENT.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Charles H. Blanchard, d/b/a Blanchard Construction Co., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

February 9, 1965

Issued as Mandate: Mar 23 1965

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IN THE

Supreme Court of the United States

_____ TERM, 1965.

NO. 279

CHARLES H. BLANCHARD d/b/a BLANCHARD CONSTRUCTION COMPANY,

Petitioner,

VERSUS

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Respondent.

REPLY BRIEF OF RESPONDENT TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

RAYMOND A. HEPNER,
FISHER & HEPNER,
P. O. Box 12064
Pensacola, Florida

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IN THE

Supreme Court of the United States

.....TERM, 1965.

No.....

CHARLES H. BLANCHARD d/b/a BLANCHARD CONSTRUCTION COMPANY,

Petitioner,

versus

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Respondent.

REPLY BRIEF OF RESPONDENT TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

STATEMENT OF THE CASE.

It is respectfully submitted that the statement of case contained in the decision of the U. S. Circuit Court, Fifth Circuit, appearing at 341 Fed 2d 351 is

accurate statement of all of the happening of events which give rise to this petition. The one point that petitioner fails to include in his statement which is one of the basis of the opinion of the Lower Court, is the fact that the litigation involved in this case rises in the following manner:

1. Petitioner after being declared in default on his contract filed suit against the respondent asking for an accounting. The respondent replied with the accounting and at the same time filed a counter-claim on an indemnity agreement then existing between the petitioner and the respondent. Trial was had on the suit in accounting and on the counter-claim of the respondent on the indemnity agreement and resulted in a verdict against the petitioner on the suit in accounting and a money verdict in favor of the respondent on the counter-claim.

QUESTIONS PRESENTED.

Petitioner fails to set out the actual question presented to the Lower Court and Circuit Court of Appeal, namely:

1. Where the petitioner was placed in default by the government and the respondent by the provisions of its bond was required to take over and complete the construction and where the petitioner instituted an action for accounting and the respondent accounted to the petitioner and filed its counter-claim on the basis of the indemnity agreement between the parties and

a money judgment was awarded to the respondent on the basis of the counter-claim and the petitioner had proceeded before the Armed Services Board of Contract Appeals for wrong determination and the respondent could not and was not party to such proceeding, and the question of accounting and the indemnity agreement was not a proper subject to be determined by the Armed Services Board of Contract Appeals, was the decision of the Armed Services Board of Contract Appeals a quasi judicial decision or in fact a judicial determination between the parties whereby relief should be granted under Federal Rules Civil Procedure 60 (b).

ARGUMENT

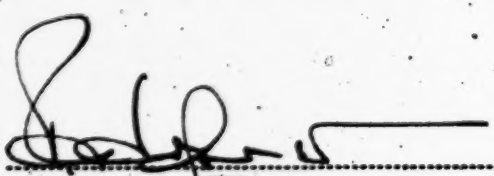
The question herein presented was answered in the negative by the Circuit Court of Appeal and by the Lower Court. At page 356 of the Circuit Court of Appeal's decision, Blanchard v. St. Paul Fire and Marine Insurance Company, (5th Cir., 1965), 341 Fed 2d 351 the Court states that the petitioner alone had the remedy against the United States for wrongful determination in the administrative proceeding, and it is not conceivable that the respondent could be a party to that proceeding and could be greatly prejudice should the petitioner eventually recover against the United States and should the respondent fail to prevail in 60(b) Federal Rules of Civil Procedure.

It is respectfully submitted that relief under Rule 60(b) provides that the Court may grant relief where the Court determines that final judgment is not legally

equitable for any other reason justifiable relief of operation of the judgment thus giving the Lower Court discretionary power to grant such relief where the facts warrant such relief. In the instant case the Lower Court denied such relief to the petitioner and the Circuit Court of Appeal approved the Lower Court's decision which sustained the fact that the Lower Court had not abused its discretionary powers.

CONCLUSION

It is respectfully submitted that based on the facts as presented to the Lower Court and the Circuit Court of Appeal this Petition for Writ of Certiorari should be denied.



RAYMOND A. HEPNER
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P. O. Box 12064
Pensacola, Florida

I HEREBY CERTIFY that copy of the above and foregoing Reply Brief of Respondent to Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, has been furnished George E. Morse, Esquire of Morse and Morse, Hatten Building, Gulfport, Mississippi, this 16th day of July, 1965, BY MAIL, postage prepaid.

RAYMOND A. HEPNER